

**UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA**

KEVIN BROOKS, )  
Petitioner, ) 3:12-cv-00497-RCJ-WGC  
vs. ) **ORDER**  
R. BAKER, *et al.*, )  
Respondents. )

This action is a *pro se* petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254, by a Nevada state prisoner.

The habeas petition in the instant action challenges petitioner's state conviction in case number C-93713. Petitioner previously challenged this same conviction in this Court, filed as a habeas petition under case number 3:97-cv-457-ECR-PHA. By order filed August 4, 1998, the habeas petition in case number 3:97-cv-457-ECR-PHA was dismissed with prejudice because the claims in the petition were procedurally defaulted and petitioner failed to show that either cause and prejudice existed to excuse the procedural default, or that a fundamental miscarriage of justice would result if his procedural default was not excused. (ECF No. 16, in 3:97-cv-457-ECR-PHA). Judgment was entered on August 5, 1998. (ECF No. 17).

“Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district

1 court to consider the application.” 28 U.S.C. § 2244(3)(A). Where a petition has been dismissed  
 2 with prejudice as untimely or because of procedural default, the dismissal constitutes a disposition  
 3 on the merits and renders a subsequent petition second or successive for purposes of 28 U.S.C.  
 4 § 2244. *McNabb v. Yates*, 576 F.3d 1028, 1029-30 (9th Cir. 2009); *Henderson v. Lampert*, 396 F.3d  
 5 1049, 1053 (9th Cir. 2005). The instant petition is a successive petition, which requires petitioner to  
 6 seek and obtain leave of the Ninth Circuit Court of Appeal to pursue. See 28 U.S.C. § 2244(b)(3) *et*  
 7 *seq.* Petitioner has not presented this Court with proof that he has obtained leave to file a successive  
 8 petition from the Court of Appeals. Therefore, the petition will be dismissed.

9 In order to proceed with any appeal, petitioner must receive a certificate of appealability. 28  
 10 U.S.C. § 2253(c)(1); Fed. R. App. P. 22; 9<sup>th</sup> Cir. R. 22-1; *Allen v. Ornoski*, 435 F.3d 946, 950-951  
 11 (9<sup>th</sup> Cir. 2006); *see also United States v. Mikels*, 236 F.3d 550, 551-52 (9th Cir. 2001). Generally, a  
 12 petitioner must make “a substantial showing of the denial of a constitutional right” to warrant a  
 13 certificate of appealability. *Id.*; 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 483-84  
 14 (2000). “The petitioner must demonstrate that reasonable jurists would find the district court’s  
 15 assessment of the constitutional claims debatable or wrong.” *Id.* (*quoting Slack*, 529 U.S. at 484). In  
 16 order to meet this threshold inquiry, the petitioner has the burden of demonstrating that the issues are  
 17 debatable among jurists of reason; that a court could resolve the issues differently; or that the  
 18 questions are adequate to deserve encouragement to proceed further. *Id.*

19 Pursuant to the December 1, 2009 amendment to Rule 11 of the Rules Governing Section  
 20 2254 and 2255 Cases, district courts are required to rule on the certificate of appealability in the  
 21 order disposing of a proceeding adversely to the petitioner or movant, rather than waiting for a notice  
 22 of appeal and request for certificate of appealability to be filed. Rule 11(a). This Court has  
 23 considered the issues raised by petitioner, with respect to whether they satisfy the standard for  
 24 issuance of a certificate of appealability, and determines that none meet that standard. The Court  
 25 will therefore deny petitioner a certificate of appealability.

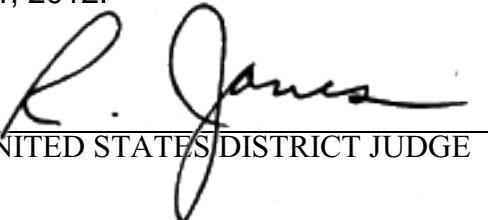
1           **IT IS THEREFORE ORDERED** that petitioner's motion to proceed *in forma pauperis*  
2 (ECF No. 1) and all other motions in this action are **DENIED**.

3           **IT IS FURTHER ORDERED** that this action is **DISMISSED WITH PREJUDICE** as a  
4 successive petition.

5           **IT IS FURTHER ORDERED** that petitioner is **DENIED A CERTIFICATE OF**  
6 **APPEALABILITY**.

7           **IT IS FURTHER ORDERED** that the Clerk **SHALL ENTER JUDGMENT** accordingly.

8           Dated this 18th day of October, 2012.

9  
10             
11           

---

  
12           UNITED STATES DISTRICT JUDGE  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26